Filed 7/13/20 P. v. Mayes CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JAMES DELANO MAYES, Defendant and Appellant.	B298207 (Los Angeles County Super. Ct. No. KA054756)

APPEAL from a postjudgment order of the Superior Court of Los Angeles County. Juan Carlos Dominguez, Judge. Affirmed.

Sally Patrone Brajevich, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Senior Assistant Attorney General, Idan Ivri and Kristen J. Inberg, Deputy Attorneys General, for Plaintiff and Respondent.

James Delano Mayes appeals the summary denial of his petition for resentencing under Penal Code[1] section 1170.95. Mayes contends that by filing a facially sufficient petition pursuant to section 1170.95, subdivision (b), he made the requisite prima facie showing under subdivision (c) that he falls within the provisions of section 1170.95. He thus asserts that the superior court was required to appoint counsel, accept briefing by the parties, and conduct a hearing at which Mayes was present and represented by counsel. Mayes further challenges the sufficiency of the evidence in support of his conviction for first degree murder as a direct aider and abettor. He asserts that because he could not be convicted under section 188 as amended by Senate Bill No. 1437 (2017–2018 Reg. Sess.), his first degree murder conviction should be vacated.

Mayes's contentions lack merit. The superior court properly determined that Mayes is ineligible for relief as a matter of law because the record reflects he was convicted of first degree murder as a direct aider and abettor, and not under a felony-murder theory or the natural and probable consequences doctrine. The superior court thus did not err in denying Mayes's petition for resentencing under section 1170.95 without first appointing counsel and conducting a hearing. As for Mayes's challenge to the sufficiency of the evidence supporting his murder conviction under a direct aiding and abetting theory, that ship has already sailed: In his direct appeal from the conviction, Mayes specifically raised, and this court expressly rejected Mayes's challenge to the sufficiency of the evidence supporting his first degree murder conviction as a direct aider and abettor.

---

[1] Undesignated statutory references are to the Penal Code.

(*People v. Haynes et al.* (Sept. 3, 2003, B159390) [nonpub. opn.] (*Haynes*).)[2] He may not now, in an appeal from the denial of a section 1170.95 petition, raise the issue anew.

FACTS AND PROCEDURAL BACKGROUND

Following a jury trial, Mayes and his codefendant, Herman Theodore Haynes, were convicted by separate juries of the first degree murder of Carla Edmonson in 2001. (*Haynes*, *supra*, B159390.) Mayes was convicted as a direct aider and abettor. In his direct appeal, Mayes asserted among other things that there was no evidence he aided and abetted Haynes in the killing. We rejected the contention, holding that having weighed the prosecution's evidence in light of the inconsistent or contrary evidence presented by the defense, the jury had concluded that Mayes was guilty of the murder of Edmonson. We found that substantial evidence, albeit circumstantial, supported the jury's determination. (*Haynes*, *supra*, B159390.)

On March 28, 2019, Mayes filed a petition for resentencing under section 1170.95, alleging that he had been convicted of first or second degree murder pursuant to the felony-murder rule or the natural and probable consequences doctrine, and could not be convicted of murder because of the changes to sections 188 and 189 by Senate Bill No. 1437. The petition further alleged that Mayes was convicted of first degree felony murder but could not now be convicted under the current section 189, because he was not the actual killer, he did not aid and abet with intent to kill, and he was neither a major participant nor acted with reckless

---

[2] We have granted Mayes's request to take judicial notice of the record in the appeal from his conviction in case No. B159390.

indifference to human life. Mayes's petition included a request that counsel be appointed to represent him.

That same day, without appointing counsel and with no appearance by Mayes or the People, the superior court summarily denied the petition. In its order the court stated: "[P]etitioner is not entitled to relief as a matter of law" because he "was convicted of murder but the court file reflects that petitioner was not convicted under a theory of felony-murder of any degree, or a theory of natural and probable consequences."

DISCUSSION

I. The Superior Court's Summary Denial of Mayes's Petition Was Proper

A. *Senate Bill No. 1437 and section 1170.95*

The Legislature enacted Senate Bill No. 1437 to "amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life." (Stats. 2018, ch. 1015, § 1, subd. (f).) To accomplish this objective, Senate Bill No. 1437 amended section 188, defining malice, and section 189, which classifies murder into two degrees and lists the predicate felonies for the crime of first degree felony murder.[3] (Stats. 2018, ch. 1015, §§ 2, 3; *People v. Martinez* (2019) 31 Cal.App.5th 719, 723.)

---

[3] The amendments to section 189 included the new requirement that a participant in a specified felony during which a death occurs may be convicted of murder for that death "only if one of the following is proven: [¶] (1) The person was the actual

Senate Bill No. 1437 and its amendment to section 188 "significantly restricted potential aider and abettor liability, as well as coconspirator liability, for murder under the natural and probable consequences doctrine, effectively overruling [*People v.*] *Chiu* [(2014) 59 Cal.4th 155 (*Chiu*)] insofar as it upheld second degree murder convictions based on that theory. Now, rather than an objective, reasonable foreseeability standard, as discussed in [*People v.*] *Prettyman* [(1996) 14 Cal.4th 248] and *Chiu*, pursuant to new section 188, subdivision (a)(3), to be guilty of murder other than as specified in section 189, subdivision (e), concerning felony murder, the subjective mens rea of 'malice aforethought' must be proved: '[T]o be convicted of murder, a principal in a crime shall act with malice aforethought.' (See also Sen. Bill 1437 (Stats. 2018, ch. 1015, § 1, subd. (g) ['[a] person's culpability for murder must be premised upon that person's own actions and subjective mens rea'].) And that required element of malice 'shall not be imputed to a person based solely on his or her participation in a crime.' (§ 188, subd. (a)(3).)" (*People v. Lopez* (2019) 38 Cal.App.5th 1087, 1103, review granted Nov. 13, 2019, S258175; *People v. Lewis* (2020) 43 Cal.App.5th 1128, 1135, review granted Mar. 18, 2020, S260598 (*Lewis*).) However, as *Lewis* observed, while the amendment to section 188 effectively eliminated use of the natural and probable consequences doctrine

---

killer. [¶] (2) The person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree. [¶] [or] (3) The person was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2." (§ 189, subd. (e)(1)–(3).)

to support a murder conviction, the change did not "alter the law regarding the criminal liability of direct aiders and abettors of murder because such persons necessarily 'know and share the murderous intent of the actual perpetrator.' (*People v. McCoy* (2001) 25 Cal.4th 1111, 1118; see *Chiu*, *supra*, 59 Cal.4th at p. 167 [a direct aider and abettor 'acts with the mens rea required for first degree murder'].)" (*Lewis*, *supra*, 43 Cal.App.5th at p. 1135, rev.gr.)

In addition to these amendments, Senate Bill No. 1437 also added section 1170.95 to provide a procedure by which those convicted of felony murder or murder under a natural and probable consequences theory can seek retroactive relief if they could no longer be convicted of murder because of the changes in sections 188 or 189. (*People v. Martinez*, *supra*, 31 Cal.App.5th at pp. 722–723.) A petition under section 1170.95 must include the following allegations:

"(1) A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine.

"(2) The petitioner was convicted of first degree or second degree murder following a trial or accepted a plea offer in lieu of a trial at which the petitioner could be convicted for first degree or second degree murder.

"(3) The petitioner could not be convicted of first or second degree murder because of changes to Section 188 or 189 made effective January 1, 2019." (§ 1170.95, subd. (a)(1)–(3).)

In addition, the petition must include a declaration of eligibility based on the requirements of subdivision (a), the year of conviction and the superior court case number, and whether

the petitioner requests appointment of counsel. (§ 1170.95, subd. (b)(1).) Subdivision (b)(2) provides that "[i]f any of the information required by this subdivision is missing from the petition and cannot be readily ascertained by the court, the court may deny the petition without prejudice to the filing of another petition and advise the petitioner that the matter cannot be considered without the missing information."

B. *Mayes failed to make a prima facie showing that he falls within the provisions of the new law as required under subdivision (c) of section 1170.95*

Mayes contends he "made a prima facie showing in his petition that he was entitled to relief pursuant to [section] 1170.95 by completing the petition, checking the appropriate boxes, and signing it under penalty of perjury." To the contrary, Mayes's petition merely satisfied the requirements of section 1170.95, subdivisions (a) and (b), which address the superior court's initial determination of the facial sufficiency of the petition. Mayes did not satisfy the prima facie showing requirement of subdivision (c).

Section 1170.95, subdivision (c) prescribes the superior court's responsibilities upon the filing of a complete petition:

"The court shall review the petition and determine if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section. If the petitioner has requested counsel, the court shall appoint counsel to represent the petitioner. The prosecutor shall file and serve a response within 60 days of service of the petition and the petitioner may file and serve a reply within 30 days after the prosecutor response is served. These deadlines shall be extended for good cause. If the petitioner makes a prima facie showing that he or

she is entitled to relief, the court shall issue an order to show cause." (§ 1170.95, subd. (c).)

In interpreting section 1170.95, we must give meaning to all parts of the statute to the extent possible. (*People v. Verdugo* (2020) 44 Cal.App.5th 320, 329, review granted Mar. 18, 2020, S260493 (*Verdugo*); *People v. Shabazz* (2006) 38 Cal.4th 55, 67 [" 'The meaning of a statute may not be determined from a single word or sentence; the words must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible' "].) "[T]he language used in a statute or constitutional provision should be given its ordinary meaning, and '[i]f the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature . . . .' [Citation.] To that end, we generally must 'accord[] significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose,' and have warned that '[a] construction making some words surplusage is to be avoided.' " (*People v. Valencia* (2017) 3 Cal.5th 347, 357; *People v. Abrahamian* (2020) 45 Cal.App.5th 314, 332.)

It is clear from the language of section 1170.95, subdivision (c) that in this next stage the superior court conducts two separate reviews of the facially sufficient petition before an order to show cause may issue: The first review is "made before any briefing to determine whether the petitioner has made a prima facie showing he or she falls within section 1170.95—that is, that the petitioner may be eligible for relief—and a second after briefing by both sides to determine whether the petitioner has made a prima facie showing he or she is entitled to relief." (*Verdugo*, *supra*, 44 Cal.App.5th at p. 328, rev.gr.)

Mayes, however, ignores the first step prescribed by subdivision (c), arguing that the superior court reviews only the summary allegations of the petition: If the court finds these allegations meet the requirements of subdivisions (a) and (b), it must also find they are sufficient to survive the initial prima facie review under subdivision (c), and the court must appoint counsel if requested. Numerous courts have rejected Mayes's position. (*Lewis, supra*, 43 Cal.App.5th at pp. 1137–1140, rev.gr.; *People v. Tarkington* (2020) 49 Cal.App.5th 892, 897–899 (*Tarkington*); *People v. Edwards* (2020) 48 Cal.App.5th 666, 673–675, review granted July 8, 2020, S262481; *People v. Torres* (2020) 46 Cal.App.5th 1168, 1173, 1178, review granted June 24, 2020, S262011; *People v. Cornelius* (2020) 44 Cal.App.5th 54, 57–58, review granted Mar. 18, 2020, S260410; *Verdugo, supra*, 44 Cal.App.5th at pp. 332–333, rev.gr.)

The issue of whether a superior court may consider the record of conviction in determining whether a petitioner has made a prima facie showing of eligibility for relief under section 1170.95 is currently under review by the California Supreme Court. (<https://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc_id=2311967&doc_no=S260598&request_token=NiIwLSEmXkw5W1BBSCMtSEJJUEw0UDxTJSJeUzNRMCAgCg%3D%3D> [as of July 7, 2020], archived at <https://perma.cc/RV72-6SDZ>.) Pending further guidance from our Supreme Court, we agree with these courts' conclusions that section 1170.95, subdivision (c) permits the superior court to review the record of conviction as well as the averments of the petition, and to summarily deny the petition without the appointment of counsel where this initial review reveals that the petitioner is ineligible for relief as a matter of law.

" 'A prima facie showing is one that is sufficient to support the position of the party in question.' " (*Lewis*, *supra*, 43 Cal.App.5th at p. 1137, rev.gr., quoting *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 851.) In the initial prima facie review required by section 1170.95, subdivision (c), the superior court must determine the petitioner's "statutory eligibility for resentencing, a concept that is a well-established part of the resentencing process under Propositions 36 and 47. [Citations.] The court's role at this stage is simply to decide whether the petitioner is ineligible for relief as a matter of law, making all factual inferences in favor of the petitioner." (*Verdugo*, *supra*, 44 Cal.App.5th at p. 329, rev.gr.) In the context of Propositions 36 and 47, as well as in habeas corpus proceedings, this initial review does not require blind acceptance of the allegations contained in the petition, but permits the court to examine the record of conviction to determine if a prima facie basis for relief exists. (*Lewis*, at pp. 1137–1138 [court's initial review of petition for resentencing under Prop. 36 and Prop. 47 to determine if petition establishes prima facie case for eligibility includes examination of the record of conviction]; see also *People v. Page* (2017) 3 Cal.5th 1175, 1188–1189 [Prop. 47]; *Teal v. Superior Court* (2014) 60 Cal.4th 595, 600 [Prop. 36].)

" 'It would be a gross misuse of judicial resources to require the issuance of an order to show cause or even appointment of counsel based solely on the allegations of the petition, which frequently are erroneous, when even a cursory review of the court file would show as a matter of law that the petitioner is not eligible for relief. For example, if the petition contains sufficient summary allegations that would entitle the petitioner to relief, but a review of the court file shows the petitioner was convicted

of murder without instruction or argument based on the felony murder rule or [the natural and probable consequences doctrine], . . . it would be entirely appropriate to summarily deny the petition based on petitioner's failure to establish even a prima facie basis of eligibility for resentencing.' " (*Lewis, supra*, 43 Cal.App.5th at p. 1138, rev.gr.)

Here, Mayes concedes and the record of his conviction, including the appellate opinion in the underlying case,[4] reveals that Mayes was convicted of first degree murder under a direct theory of aiding and abetting.[5] (*Haynes*, *supra*, B159390.) However, a direct aider and abettor can be convicted of murder notwithstanding the amendments to sections 188 and 189, which changed nothing with regard to direct aider and abettor liability. "One who directly aids and abets another who commits murder is thus liable for murder under the new law just as he or she was liable under the old law." (*Lewis*, *supra*, 43 Cal.App.5th at p. 1135, rev.gr.) Accordingly, Mayes was required to make a prima facie showing that he was not convicted as a direct aider and abettor, and thereby " 'falls within the provisions of' the statute." (*Lewis*, at p. 1137; § 1170.95, subds. (a)(3) & (c).) He failed to do so. The superior court therefore properly denied the petition on the basis of its finding that Mayes was not entitled to relief as a matter of law because he was not convicted under a

---

[4] An appellate opinion is part of the record of conviction. (*People v. Cruz* (2017) 15 Cal.App.5th 1105, 1110.)

[5] The jury was instructed on aiding and abetting, but not on principles of felony murder or the natural and probable consequences doctrine.

theory of felony murder or natural and probable consequences, the two theories affected by Senate Bill No. 1437.

In sum, the allegations in the petition that Mayes "could not now be convicted of 1st or 2nd degree murder because of changes made to Penal Code §§ 188 and 189" and that he was "convicted of 1st degree felony murder" are contradicted by the record of conviction. Because the record of conviction plainly shows that Mayes does not fall within the provisions of the statute, he did not make the first prima facie showing required under section 1170.95, subdivision (c). Mayes is thus ineligible for relief as a matter of law, and the superior court properly denied his petition. (§ 1170.95, subd. (c); *Verdugo*, *supra*, 44 Cal.App.5th at p. 329, rev.gr.)

II. Mayes Was Not Entitled to Appointed Counsel

Despite his failure to meet his obligation to make a prima facie showing of eligibility for relief, Mayes nevertheless maintains the superior court should have appointed counsel and proceeded to the next stages of review under section 1170.95, subdivision (c).

We reject the assertion on the basis of the *Lewis*[6] court's reasoning, which we adopt: "The provision for the appointment of counsel is set forth in the second sentence of section 1170.95, subdivision (c), and does not, when viewed in isolation, indicate

---

[6] The question of when the right to appointed counsel arises under section 1170.95, subdivision (c) is also pending before the California Supreme Court. (<https://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc_id=2311967&doc_no=S260598&request_token=NiIwLSEmXkw5W1BBSCMtSEJJUEw0UDxTJSJeUzNRMCAgCg%3D%3D> [as of July 7, 2020], archived at <https://perma.cc/RV72-6SDZ>.)

when that duty arises. When interpreting statutory language, however, we do not ' "examine that language in isolation, but in the context of the statutory framework as a whole." ' [Citation.] When the statutory framework is, overall, chronological, courts will construe the timing of particular acts in relation to other acts according to their location within the statute; that is, actions described in the statute occur in the order they appear in the text." (*Lewis, supra*, 43 Cal.App.5th at pp. 1139–1140, rev.gr.) Thus, "the requirement to appoint counsel as arising in accordance with the sequence of actions described in section 1170.95 subdivision (c); that is, after the court determines that the petitioner has made [the first] prima facie showing that petitioner 'falls within the provisions' of the statute, and before the submission of written briefs and the court's determination whether petitioner has made 'a prima facie showing that he or she is entitled to relief.' " (*Id*. at p. 1140; *Tarkington*, *supra*, 49 Cal.App.5th at pp. 900–901.)

We also reject Mayes's claim that the dismissal of his petition without the appointment of counsel violated his federal constitutional rights to counsel and due process under the Sixth and Fourteenth Amendments.

The United States Supreme Court has declared that the Sixth Amendment "right to appointed counsel extends to the first appeal of right, and no further." (*Pennsylvania v. Finley* (1987) 481 U.S. 551, 555.) In this regard, the high court has explained that a petition seeking postconviction relief by an imprisoned defendant constitutes "a collateral attack that normally occurs only after the defendant has failed to secure relief through direct review of his conviction. States have no obligation to provide this avenue of relief, [citation], and when they do, the fundamental

fairness mandated by the Due Process Clause does not require that the State supply a lawyer as well." (*Id.* at p. 557; *In re Barnett* (2003) 31 Cal.4th 466, 474.) Likewise, the California constitution confers no unconditional constitutional right to counsel to mount a collateral attack on a judgment of conviction, and the rules for postconviction relief—whether by petition for writ of habeas corpus or *coram nobis*—require the petition to first make a prima facie showing of entitlement to relief before the court issues an order to show cause and appoints counsel. (*In re Barnett*, at p. 475 [habeas corpus]; *People v. Shipman* (1965) 62 Cal.2d 226, 232–233 [*coram nobis*]; *People v. Fryhaat* (2019) 35 Cal.App.5th 969, 982; *People v. Rodriguez* (2019) 38 Cal.App.5th 971, 982.)

Mayes did not make a prima facie showing that he came within the provisions of section 1170.95, which would have triggered a statutory right to counsel. (§ 1170.95, subd. (c).) In the absence of the requisite prima facie showing that Mayes was entitled to relief, the superior court was not required to appoint counsel, order briefing, issue an order to show cause, or schedule a hearing. (See § 1170.95, subds. (c), (d)(1).)

Mayes cites *In re Cobbs* (2019) 41 Cal.App.5th 1073, 1079–1080 (*Cobbs*) in support of his contention that his right to counsel was violated when the superior court summarily denied the sentencing petition without appointing counsel. *Cobbs* is inapposite.

In *Cobbs*, the defendant was convicted of first degree murder following a jury trial in which the prosecution relied on two theories of guilt: felony murder based on attempted robbery, and murder as the natural and probable consequence of assault and battery. (*Cobbs*, *supra*, 41 Cal.App.5th at p. 1075.) The

judgment of conviction was affirmed on appeal. (*Id.* at p. 1076.) Thereafter, the matter returned to the Court of Appeal on a petition for habeas corpus in which the defendant contended his first degree murder conviction under the natural and probable consequences doctrine was invalid under *Chiu*, *supra*, 59 Cal.4th 155 and *In re Martinez* (2017) 3 Cal.5th 1216, and both theories of conviction—felony murder and natural and probable consequences—were invalid in light of the amendments enacted by Senate Bill No. 1437. (*Cobbs*, at pp. 1075–1076.)

Nowhere in the opinion did *Cobbs* examine the required procedures under section 1170.95, subdivision (c), much less discuss the appointment of counsel under that section. Rather, *Cobbs* expressly rejected defendant's challenge under Senate Bill No. 1437 on the ground that the resentencing relief afforded by the legislation is not available in a habeas corpus proceeding, but only through a petition filed in accordance with the requirements of section 1170.95. (*Cobbs*, *supra*, 41 Cal.App.5th at pp. 1075–1076; *People v. Martinez*, *supra*, 31 Cal.App.5th at p. 729 [a "defendant must file a section 1170.95 petition in the trial court to seek retroactive relief under Senate Bill 1437"].)

III. Mayes May Not Challenge the Sufficiency of the Evidence Supporting His Murder Conviction in an Appeal from the Denial of His Section 1170.95 Petition

Claiming there was "no solid evidence" that Mayes "aided and abetted the murder with the intent to kill," Mayes argues at length that his first degree murder conviction must be vacated. Mayes has already challenged the sufficiency of the evidence in support of his conviction as an aider and abettor in his direct appeal, and lost. (*Haynes*, *supra*, B159390.) As discussed above,

nothing in the amendments to sections 188 and 189 altered the criminal liability of direct aiders and abettors of murder: Such persons may still be convicted of first degree premeditated murder based on their own knowledge of the perpetrator's unlawful purpose and their own intent to commit, encourage, or facilitate the commission of the murder. (*Chiu*, *supra*, 59 Cal.4th at p. 167 [direct aider and abettor "acts with the mens rea required for first degree murder"]; *Lewis*, *supra*, 43 Cal.App.5th at p. 1135, rev.gr.)

Mayes cannot challenge the sufficiency of the evidence supporting his first degree murder conviction as a direct aider and abettor in an appeal from the denial of his section 1170.95 petition.

DISPOSITION

The postjudgment order is affirmed.

NOT TO BE PUBLISHED.

LUI, P. J.

We concur:

CHAVEZ, J.

HOFFSTADT, J.